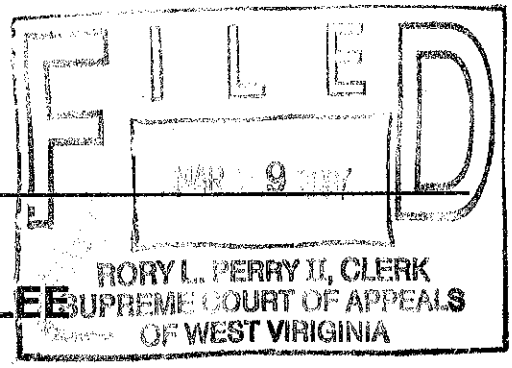
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ANGELA ADKINS,
Appellee (Petitioner below)

v. **Docket No. 33312**

CHRISTOPHER ADKINS
Appellant (Respondent below)



BRIEF OF APPELLEE

On direct appeal from the Family Court of Cabell County

Civil Action No. 04-D-612

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I. Statement of the Case

This matter is before the court on the appeal of a father/child support obligor (hereafter, "Appellant") to the denial of his petition to lower or to eliminate his child support obligation. The issue presented by this case–whether an incarcerated parent should realize a benefit from his/her criminal conduct by the elimination of a child support obligation during that incarceration–is one of first impression for the court.

In late 2004, the parties were divorced by a final order of the Family Court of Cabell County. That final order set a child support obligation on Appellant as the non-custodial parent of the parties' two minor children in a monthly amount of three hundred ninety-two dollars, sixty-seven cents ($392.67). The lower court's calculation of Appellant's support obligation derived from income of $9.12/hour he earned from his position as a truck driver.

Immediately preceding and directly precipitating the separation of the parties was the discovery by the mother/custodial parent (hereafter, "Appellee") that Appellant had committed sexual assault against a child living in the parties' home. A criminal case was brought against Appellant for the sexual assault of the child and he pled guilty to the crime of third degree sexual assault on February 17, 2006. On April 12, 2006, Appellant began serving a prison term of two-to-ten years.

Soon after his incarceration, Appellant filed a petition in the Family Court of Cabell County seeking a reduction in his child support obligation based exclusively on the fact of that incarceration. The family court refused both Appellant's request to reduce his child support based on his incarceration and his alternative request to recalculate that obligation on the basis of attributed minimum wage ($5.15/hour) as opposed to his pre-incarceration wages ($9.12/hour). The family court's September 27, 2006, final order

equates Appellant's commission of a crime to voluntary unemployment, attributes income to him in the amount he had earned prior to his incarceration and leaves his child support obligation unchanged during his period of incarceration.

Appellee urges this court to reject the notion that parents who commit crimes should realize a benefit from that conduct. Rather, Appellee advocates for the adoption of a rule that more appropriately places the welfare and future financial security of an incarcerated parent's children above the scarcely defensible interests of that criminal parent.

II. Argument

A. There is a strong legislative priority assigned to the establishment, collection and uniform enforcement of child support obligations in West Virginia.

The statutes of this state relating to child support obligations and their methods of enforcement reveal a particularly high legislative priority assigned to those obligations. The public policy considerations behind the special status afforded child support obligations are expressly detailed in the statements of legislative intent attached to those statutes:

> It is the intent of the Legislature that to the extent practicable, the laws of this state should encourage and require a child's parents to meet the obligation of providing that child with adequate food, shelter, clothing, education, and health and child care.
>
> * * *
>
> This article establishes guidelines for child support award amounts so as to ensure greater uniformity by those persons who make child support recommendations and enter child support orders and to increase predictability for parents, children and other persons who are directly affected by child support orders.

West Virginia Code §48-11-101 and *West Virginia Code* §48-13-101[1].

One of the ways the Legislature elected to accomplish its stated goals was to provide a remedy–"attributed income" under *West Virginia Code* §48-1-205–against a parent's voluntary conduct that would lower income, thereby lowering a purely formulaic child support calculation. "Income may be attributed to a parent if the court evaluates the parent's earning capacity in the local economy (giving consideration to relevant evidence that pertains to the parent's work history, qualifications, education and physical or mental condition) and determines that the parent is unemployed, is not working full time, or is working below full-earning capacity." *West Virginia Code* §48-1-205(a).

This court most notably addressed the authority to attribute income in *Porter v. Bego*, 488 S.E.2d 443 (W.Va. 1997). "If a parent obligated to pay support voluntarily, and without cause, reduces his or her employment income, then the court or family law master may establish that parent's gross income at a level similar to his or her previous income, or at a minimum, what the obligor could earn working forty hours per week at the federal minimum wage." 488 S.E.2d at 451. More recently, the court stated "(a)ttributed income consists of moneys which a support obligor should have earned

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[1]In recent years, the focus of the West Virginia Legislature and the family courts seems to have been on the *collection* of child support obligations as opposed to the seemingly more esoteric question of *who should pay* those obligations. In fact, the issue of whether incarcerated parents should realize relief from child support has been addressed in almost forty (40) other states with the majority of those jurisdictions permitting the attribution of income approach utilized by the family court in this case. A recent, informal poll of the family court circuits by the Bureau for Child Support Enforcement (hereafter, "BCSE") reveals widely varying approaches to this issue as addressed in family court circuits across the state. It is imperative to the Legislature's directive "to ensure greater uniformity" that this court resolve the issue in West Virginia.

had he or she diligently pursued reasonable employment opportunities or reasonably utilized, applied, or invested his or her assets." *State ex rel DHHR v. Gibson*, 535 S.E.2d 193, 197 (W.Va. 2000).

In both *Porter* and *Gibson*, the court recognized that the question of "(w)hether a parent has reduced their income 'without cause' is necessarily a fact-based determination that will change on a case-by-case basis." 488 S.E.2d at 451; 535 S.E.2d at 198. The "fact-based determination" that has not yet been considered by this court–but that has been addressed in many other states–is whether a support obligor's incarceration equates to a voluntary and without cause reduction in income sufficient to justify an attribution of income under *West Virginia Code* §48-1-205. The public policy of this state–codified by the Legislature so as to "...encourage and require a child's parents to meet the obligation of providing that child with adequate food, shelter, clothing, education, and health and child care"–demands such an interpretation as a means of accomplishing the legislative intent outlined in the child support statutes.

B. The analysis and approach of other states to the competing public policy considerations support the attribution of income to incarcerated West Virginia child support obligors.

The competing public policy considerations on each side of the issue are relatively few and uncomplicated.[2] It is almost universally recognized that statutes requiring parents to provide support for their children and supplying methods for enforcing that support

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[2]The public policy considerations are discussed in depth in at least two law review articles. *See, Drew A. Swank, Enforcing the Unenforceable: Child Support Obligations of the Incarcerated,* 7 UC Davis J. Juv. L. & Pol'y 61, Winter 2003; *Cavanaugh & Pollack, Child Support Obligations of Incarcerated Parents,* 7 Cornell J.L. & Pub. Pol'y 531 (Winter 1998).

are, at their core, designed to protect and to further the best interests of the child. *See*, *Yerkes v. Yerkes*, 824 A.2d 1169 (Pa. 2003)("The principal goal in child support matters is to serve the best interests of the child through the provision of reasonable expenses."). If a parent–incarcerated or otherwise–fails to pay a child support obligation, the needs of the child do not change and the burden of supporting the child does not evaporate. *See, Reid v. Reid*, 944 S.W.2d 559, 562 (Ark.Ct.App. 1997) ("Moreover, the needs of the children have remained unchanged, and, as between appellant and his children, the interest of the children must prevail."). Whether due to an obstinate refusal, a negligent failure or a temporary inability to support a child, any failure to pay support has the same effect: it simply causes a shift in that burden of support to the other parent, to other family members or, in many cases, to the state. *Yerkes*, 824 A.2d at 1174, ftnt 6, quoting *Cavanaugh & Pollack, supra* ("Likewise, public policy considerations require that other family members or private individuals who paid the child support owed by the obligor during the obligor's incarceration, should be reimbursed for their expenditures. Private individuals should not be forced to assume the responsibility and obligations of the incarcerated parent any more than the state should."). In short, states have a keen interest in ensuring that parents provide adequate levels of support for their children so the children remain protected and those financial burdens do not fall to the state itself.

Family courts of this state are also under a legislative directive "...to ensure greater uniformity by those persons who make child support recommendations and enter child

support orders and to increase predictability for parents, children and other persons who are directly affected by child support orders." *West Virginia Code* §48-13-101. At present, family courts appear to be addressing the issue with internal consistency within each family court circuit but the approach among the circuits is highly varied. The informal BCSE survey (and anecdotal experience by counsel) reveals that some family courts follow the approach adopted by the Cabell County Family Court in this case and attribute income in an amount consistent with the support obligor's pre-incarceration earnings. Other family courts attribute minimum wage under *West Virginia Code* §48-1-205 and set the support obligation on that basis. Still other family courts ignore attributed income altogether and set support at the statutory minimum of fifty dollars ($50.00) per month. *West Virginia Code* §48-13-302. Finally, there are a group of family courts which, when presented with the issue, wholly eliminate any support obligation during periods when the non-custodial parent is in jail. The inconsistency in the approaches currently employed by family courts across West Virginia--in light of the legislative goal "...to ensure greater uniformity by those persons who make child support recommendations"--underscores the need to resolve the issue in West Virginia. *West Virginia Code* §48-13-101.

Of all the courts that have addressed the issue, the Supreme Court of Pennsylvania engaged in the most comprehensive study and discussion of the public policy issues in *Yerkes v. Yerkes*, 824 A.2d 1169 (Pa. 2003).[3] The *Yerkes* court discovered "...a wealth

[3]The facts of *Yerkes* closely mirror those of the present case. An incarcerated father--in jail for sexually assaulting a child for whom he owed a duty of support--petitioned to reduce his

of case law that can be loosely categorized into three groups, each of which represents a different approach to assessing the effect of incarceration on support obligations." 824 A.2d at 1171-72.

> The first approach, dubbed the "**no justification**" rule, generally deems criminal incarceration as insufficient to justify elimination or reduction of an open obligation to pay child support. (Citations omitted) (emphasis added). The second approach, known as the "**complete justification**" rule, generally deems incarceration for criminal conduct as sufficient to justify elimination or reduction of an existing child support obligation. (Citations omitted) (emphasis added). Finally, the third approach is the "**one factor**" rule, which generally requires the trial court to simply consider the fact of criminal incarceration along with other factors in determining whether to eliminate or reduce an open obligation to pay child support. (Citations omitted) (emphasis added).

824 A.2d at 1172; *see also*, *Halliwell v. Halliwell*, 741 A.2d 628, 644-45 (N.J. Super. App. Div. 1999); *In re Thurmond*, 962 P. 2d 1064 (Kan. 1998). The *Yerkes* court's review revealed fifteen (15) jurisdictions that follow the "no justification" approach; seven (7) jurisdictions following the "complete justification" approach; and nine (9) jurisdictions following the "one factor" approach.[4] Id.

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existing child support obligation on grounds that his prison income of $0.41/hour rendered it impossible for him to satisfy a support obligation that had been based on a previous salary of over two hundred forty dollars ($240.00) per week. 824 A.2d at 1170. The father argued that his incarceration and attendant lower income was a "material change in circumstances" sufficient to justify a reduction in his support obligation under the rules governing child support in Pennsylvania. Although the case was not decided by the Pennsylvania court until 2003, the *Yerkes* support obligor had been in prison since 1994 and was scheduled for release in 2004.

[4]An updated review of this survey suggests the count now stands at approximately twenty-one (21) jurisdictions following the "no justification" approach; ten (10) jurisdictions adhering to the "complete justification" rule; and, eight (8) jurisdictions in which incarceration is "one factor" in determining whether to continue a child support obligation against an incarcerated support obligor. The following jurisdictions generally deny relief to the

incarcerated obligor following the "**no justification**" rule: **Arkansas,** *Reid v. Reid*, 944 S.W.2d 559 (Ark.Ct.App. 1997); **Connecticut**, *Shipman v. Roberts*, No. FA000630559, 2001 Conn. Super. LEXIS 1653, at 27 (Conn. Super. Ct. June 7, 2001); **Delaware,** *Division of Child Support Enforcement v. Barrows*, 570 A.2d 1180 (Del. 1990); **Georgia**, *Staffon v. Staffon*, 587 S.E.2d 630 (Ga. 2003); **Indiana**, *Ross v. Ross*, 581 N.E.2d 982 (Ind.Ct.App.1991); *Davis v. Vance*, 574 N.E.2d 330 (Ind.Ct.App. 1991); **Kansas**, *In re Marriage of Thurmond*, 962 P.2d 1064 (Kan. 1998); **Kentucky**, *Commonwealth v. Marshall*, 15 S.W.3d 396 (Ky.Ct.App. 2000); *Redmon v. Redmon*, 823 S.W.2d 463 (Ky.Ct.App. 1992); **Louisiana**, *State v. Nelson*, 587 So. 2d 176 (La.Ct.App. 1991); *Alexander v. Alexander*, 417 So.2d 92 (La.Ct.App. 1982); **Maine**, *Hebert v. Hebert*, 475 A.2d 422 (Me. 1984); **Montana**, *Mooney v. Brennan*, 848 P.2d 1020, 1023 (Mont. 1993); **Nebraska**, *State on behalf of Longnecker v. Longnecker*, 660 N.W.2d 544 (Neb. 2003); **New Mexico**, *Thomasson v. Johnson*, 903 P.2d 254 (N.M.1995); **New York**, *Matter of Winn v. Baker*, 2 App.Div.3d 1169, 768 N.Y.S.2d 708 (2003); *Furman v. Barnes*, 293 App.Div.2d 781, 739 N.Y.S.2d 655 (2002); *Knights v. Knights*, 71 N.Y.2d 865, 522 N.E.2d 1045, 527 N.Y.S.2d 748 (1988); *Frasca v. Frasca*, 213 App.Div.2d 589, 624 N.Y.S.2d 259 (1995); *Romanous v. Romanous,* 181 A.D.2d 872, 581 N.Y.S.2d 410 (1992); **North Dakota**, *Ramsey County Soc. Serv. Bd. v. Kamara*, 653 N.W.2d 693 (N.D. 2002); **Ohio**, *Richardson v. Ballard*, 681 N.E.2d 507, 508 (Ohio Ct. App. 1996); **Oklahoma**, *Jones v. Baggett*, 990 P.2d 235, 245 (Okla. 1999); **Pennsylvania**, *Yerkes v. Yerkes*, 824 A.2d 1169 (Pa. 2003); **Texas**, *Reyes v. Reyes*, 946 S.W.2d 627 (Tex.App.-Waco 1997); **Utah**, *Proctor v. Procter*, 773 P.2d 1389 (Utah Ct.App. 1989); **Virginia**, *Layman v. Layman*, 488 S.E.2d 658 (Va.Ct.App.1997), and; **Wyoming**, *Glenn v. Glenn*, 848 P.2d 819 (Wyo. 1993).

The following jurisdictions follow the "**complete justification**" rule (or something akin to it), relieving an incarcerated obligor of all or most of his support obligation: **California**, *In Re The Marriage Of Smith*, 90 Cal.Ct.App.4th 74, 108 Cal.Rptr.2d 537 (2001); *State of Oregon v. Vargas*, 70 Cal.Ct. App. 4th 1123, 83 Cal. Rptr. 2d 229 (1999); **District of Columbia**, *Lewis v. Lewis*, 637 A.2d 70 (D.C.Ct.App. 1994); **Idaho**, *Nab v. Nab*, 757 P.2d 1231 (Idaho 1988); **Illinois**, *People ex rel. Meyer v. Nein*, 568 N.E.2d 436 (Ill.App.Ct. 1991); **Maryland**, *Wills v. Jones*, 340 Md. 480, 667 A.2d 331 (Md. 1995); **Michigan**, *Pierce v. Pierce*, 412 N.W.2d 291 (Mich.Ct.App. 1987); **Minnesota**, *Franzen v. Borders*, 521 N.W.2d 626 (Minn.Ct.App. 1994); *Kuronen v. Kuronen*, 499 N.W.2d 51 (Minn.Ct.App. 1993); *Johnson v. O'Neill*, 461 N.W.2d 507 (Minn.Ct.App. 1990); **Oregon**, *In re Marriage of Willis & Willis*, 314 Ore. 566, 840 P.2d 697 (Or. 1992); **Wisconsin**, *Voecks v. Voecks*, 171 Wis. 2d 184, 491 N.W.2d 107 (Wis.Ct.App. 1992), and; **Washington**, *Matter of Marriage of Blickenstaff*, 859 P.2d 646 (Wash.Ct.App. 1993).

A number of additional jurisdictions yield inconsistent results, either because they follow the "**one factor**" rule whereby incarceration is considered one factor among facts which could result in either imposing or relieving the obligor of a support order, or because of internal conflicts within the state: **Alabama**, *Alred v. Alred*, 678 So.2d 144 (Ala. Civ. App. 1996); **Alaska**, *Bendixen v. Bendixen*, 962 P.2d 170 (Alaska 1998); **Colorado**, *In re Marriage of Hamilton*, 857 P.2d 542 (Colo.Ct.App. 1993); **Florida**, *Held v. Held*, 617 So.2d 358 (Fla.Dist.Ct.App. 1993); **Mississippi**, *Avery v. Avery*, 864 So.2d 1054 (Miss.Ct.App. 2004); **Missouri**, *Oberg v. Oberg*, 869 S.W.2d 235 (Mo.Ct.App.W..Dist. 1993); **New Jersey**, *contrast Kuron v. Hamilton*, 752 A.2d 752 (N.J.Super.App.Div. 2000) and *Bergen County Bd. of Servs. v. Steinhauer*, 294 N.J. Super. 507, 683 A.2d 856 (Chancery Div. 1996), with *Halliwell v. Halliwell*, 326 N.J.Super. 442, 741 A.2d 638 (App.Div. 1999); **Iowa**, *In re Walters*, 575 N.W.2d

To some extent, each jurisdiction in which the issue has been addressed has considered the competing public policy considerations.

> It is apparent from the rationale expressed in these cases from other states that, essentially, the result each reached does not rest on the statutes and prior case law of the particular state. Virtually all could have chosen any of the three options or hybrids thereof. The common thread in these opinions is that the ultimate decision rested on philosophical or public policy considerations.

In re Thurmond, 962 P. 2d at 1072. When applied to the legislative public policy priorities requiring parents to provide support for their children and achieving greater uniformity and consistency in the application and enforcement of child support obligations, the public policy of West Virginia demands that the "no justification" rule affording jailed child support obligors no relief from those obligations during periods of incarceration must prevail.

C. The "no justification" rule is most consistent with West Virginia public policy on the establishment and enforcement of child support obligations.

The *Yerkes* court identified three considerations it found most other courts had applied in determining what approach to take: "(1) whether allowing relief to an incarcerated parent serves the best interests of the child, (2) whether relief is in accord with fairness principles, and (3) whether it is appropriate to treat incarceration in the same manner as voluntary unemployment." 824 A.2d at 1173.

739, 743 (Iowa 1998).

After a discussion of the arguments on each side of the first consideration, the *Yerkes* court concluded that "...the 'no justification' rule at least provides for the possibility that the obligor will repay the support owed to the child" and, therefore, found that it best serves the child's interests. 824 A.2d at 1174. The court also found support for the "no justification" rule in its analysis of the second consideration, in that it would not promote fairness to allow an obligor to benefit from criminal conduct by using that conduct to escape a support obligation. *Id.* Finally–and after extensively quoting rulings going both ways–the court also found that it is appropriate to treat incarceration in the same manner as voluntary unemployment. 824 A.2d at 1176-77. The *Yerkes* court quoted with approval a statement from the Supreme Court of Kansas on the justification for treating incarceration like voluntary unemployment:

> Most inmates would have difficulty accepting the concept that their incarceration is to be considered "voluntary." It is more accurate to say that a reduction of income from a cause beyond the obligor's control (such as illness, injury, lay-off, etc.) should be considered differently from those which arise from causes within his or her control. Criminal activity foreseeably can lead to incarceration and such activity is obviously within an individual's control.

824 A.2d at 1176, quoting, *In re Thurmond*, *supra* at 1073. An application of the reasoning employed by the *Yerkes* court to the facts of the present case and to the public policy considerations of West Virginia is revealing and compelling in its support for adoption of the "no justification" rule.

1. *The Best Interests of the Child Consideration*

The paramount consideration in issues of child welfare in this state has long been the

best interests of the child. *See, e.g., Porter v. Bego*, 488 S.E.2d at 452 ("...the polar star is always the best interests of the child."); *West Virginia Code* §48-9-206(c) ("...the court shall allocate custodial responsibility based on the child's best interest..."); *West Virginia Code* §48-10-101 ("...as in all situations involving children, the best interests of the child or children are the paramount consideration."). In determining whether it is appropriate to attribute income to an incarcerated parent for child support purposes, the best interests of the child must necessarily be considered first, with the interests of the imprisoned obligor, the custodial parent, the already over-burdened family court system and society as a whole as secondary concerns. The best interests of the parties' children in this case would be served by attributing income to the incarcerated father and continuing a support obligation during his period of incarceration.

Appellant in the present case committed a sexual crime against a child who was living in the parties' home but to whom he owed no duty of support[5]. By that criminal conduct, he now seeks to eliminate or to reduce his support obligation to his own children. In essence, Appellant's aggressive pursuit of relief from his support obligation expands his victimization of children that began–or, at least the criminal consequences of which began–with his sexual assault of another child living in his home. It can not be

[5]It is in this fact that the present case provides a marginally weaker basis for adoption of the "no justification" rule than did the facts of *Yerkes*. The support obligor in *Yerkes* was imprisoned for sexual assault of his own daughter and sought to use that conduct as a means to reduce his support obligation to that very child. At the very end of the decision and after its discussion and holding, the *Yerkes* court comments in a footnote that it would be particularly inappropriate to relieve the father's support obligation under the particular circumstances of the case. 824 A.2d at 1177, ftnt. 13, citing *Reid v. Reid,* 944 S.W.2d at 462.

considered in his children's best interests to permit Appellant to realize a benefit from his criminal conduct by depriving those children of the potential for the receipt of future support payments. To do so would be equivalent to showing mercy to the parent-murdered because his own criminal conduct has left him an orphan.

In the *Yerkes* court's discussion of the best interests of the child consideration, it cites to and rejects the best interests analyses utilized by states adopting the "complete justification" rule which relieves an incarcerated parent of any support obligation. In essence, those courts argue that there is no realistic likelihood of ever recovering a back award of support from a parent after a release from prison. The lack of a present benefit to the child–the "complete justification" courts conclude–means it is not in the child's best interest for a court to impose a support obligation on an incarcerated parent. *See, Pierce v. Pierce*, 412 N.W.2d 291 (Mich.Ct.App.1987). "Complete justification" courts have also suggested that it is not in the child's best interests for the state's judicial resources to be burdened trying to collect unenforceable arrearages. *Bergen County v. Steinhauer*, 683 A. 2d 856, 861 (N.J.Super. 1996). These arguments, however, put the interests of the incarcerated parent and those of the state ahead of the interests of the child; a result inconsistent both with the explicit public policy of this state and with the often-recited priorities of this court.

Appellee does not contest that Appellant lacks the present ability to pay a child support obligation nor does she argue that Appellant could or should be held in contempt of

court for non-payment of a support obligation during his incarceration. *West Virginia Code* §48-1-304(c). As of the presentation of this brief, Appellant will have served almost one year of a period of incarceration that could end just over one year from now. Accruing at a rate of about $4,700/year (before interest), Appellant will undoubtedly have a significant support arrearage upon his release from incarceration, but not one that will be unrealistically high or unmanageable upon his release. In any event, his past work experience and qualifications as a truck driver should provide a variety of employment options when he is again free. The expected duration of a prison sentence and the support obligor's past and future earning capacity are factors that have been emphasized by courts in jurisdictions that have adopted the "one factor" approach. *See, e.g., Thomasson v. Johnson*, 903 P.2d 254, 257 (N.M. 1995); *Oberg v. Oberg*, 869 S.W.2d 235, 238 (Mo. App. 1993). Again, however, a consideration of these factors inappropriately tips the balance away from the best interests of the child in favor of the best interests of the incarcerated parent.[6] "...(A)s between (the obligor) and his children, the interest of the children must prevail." *Reid*, 944 S.W.2d at 562.

Putting aside for the time being the big-picture public policy arguments and focusing

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[6]Appellee concedes that under the "no justification" approach, some incarcerated support obligors will realize arrearages that are insurmountable upon a release from prison. For example,a lawyer with a support obligation based on annual income of $200,000 who goes to jail for twenty years and is released with no law license has little realistic chance of ever satisfying the full amount of the arrearage. The child support laws of this state, however, take into account the capacity of an obligor to pay support and arrearages based on current income and do not permit incarceration upon a criminal finding of contempt against an obligor with an arrearage in the event the obligor lacks the financial ability to pay. *West Virginia Code* §48-14-408; *West Virginia Code* §48-1-304(c).

exclusively on the children who will be affected by the decision in this case, it is hard to form a valid argument that anything other than the "no justification" approach would serve the best interests of Appellant's children. Appellant's criminal conduct fomented a divorce, profoundly and irreparably damaged the life of the child he sexually abused and deprived his own children of his love, companionship and financial support during his incarceration. There is nothing this court can do to reverse the emotional devastation left by the maelstrom of Appellant's criminal conduct; this court's capacity to cure the trauma inflicted by Appellant is limited to providing his children the prospect of some measure of support from him upon his release from jail. It is in the best interests of Appellant's children that they be permitted the hope of recovering from some of the financial hardships visited on them by Appellant's voluntary decision to violate the law by violating the innocence of someone else's child.

2. *The Fairness Consideration*

Although far from objective, the *Yerkes* court reviewed the second consideration –whether relief is in accord with fairness principles–from a non-emotional vantage point; it concluded that fairness requires adoption of the "no justification" approach "...because affording relief to the incarcerated parent would effectively subordinate child support payments to the parent's other financial obligations," which are not relieved by incarceration. 824 A.2d at 1175. The court acknowledged the particular priority afforded to child support payments in Pennsylvania; a priority similar to that afforded such payments in West Virginia. *Id.*; *See, e.g., West Virginia Code* §48-14-

101 *et seq.* It is inconceivable that a court could, in the name of fairness, relieve an incarcerated parent of a duty of support so he would not "...be saddled with an onerous burden upon release from prison" while shifting the entire burden of support to the shoulders of the innocent parent who remains free. 824 A.2d at 1175. The law does not relieve an incarcerated parent of any other debt or financial obligation merely because he has voluntarily engaged in conduct that resulted in incarceration. There is certainly no justification for the public policy of this state to forgive a child support obligation when no other debts of a criminal parent are forgiven during incarceration.

The *Yerkes* court's reasoning on this point is also quite compelling when applied to the public policy of West Virginia. Financial institutions with security interests in the property of an incarcerated parent offer no relief from those financial commitments as a result of the debtor's imprisonment. Those secured creditors will simply act to collect the debt by foreclosure on the security. Unsecured creditors effectively lose the capacity to collect against an incarcerated person but the obligation does not evaporate and interest continues to accrue during the incarceration. No one seriously argues that these other negative financial consequences attendant to incarceration are "unfair" to the imprisoned debtor; rather, they are merely acknowledged as the cost of committing a crime and a partial repayment of the convict's debt to society[7]. The

[7]An example of this argument is more illustrative under a different factual scenario. If, for example, Appellant in this case had a home with substantial equity in it but no means to make the remaining payments while incarcerated, Appellant would either sell the home himself or the lien holder would likely seek a foreclosure sale after a period of non-payment. If Appellant was to be relieved of any support obligation while in jail, the net proceeds from the sale of that home would go back to Appellant rather than to the children he will otherwise

adoption of any approach other than the "no justification" rule would place the obligation of a parent to support a child subservient to all other financial obligations of the incarcerated parent.

Another perspective on the fairness consideration is apparent from a fragment of the New Jersey Superior Court's reasoning in *Bergen County v. Steinhauer*, 683 A.2d 856 (N.J. Super. 1996). The *Steinhauer* court recognized that

> (n)o process to automatically review the support obligations of incarcerated payors exists in New Jersey. Many incarcerated payors are unlikely to take the affirmative action of asking for relief in a timely manner and thus will lose the opportunity for relief since New Jersey prohibits the retroactive modification of child support.

683 A.2d at 858 (cite omitted). West Virginia similarly prohibits the retroactive modification of a child support obligation except in exceedingly limited circumstances. *Carter v. Carter*, 479 S.E.2d 681 (W.Va. 1996). West Virginia also has no automatic process for the review of support obligors who become incarcerated. The confluence of these two facts militates solidly in favor of continuing the support obligation in order to ensure fairness to two distinct groups: fairness to the children of support obligors in this state and fairness among support obligors within this state.

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wholly fail to support while in jail. Adoption of the "complete justification" rule gives no consideration to the availability of an obligor's other assets and would guarantee this result in every similar case. Adoption of the "one-factor" approach could–arguably–address this unfairness but would require substantial family court time and resources to address the issue *in each and every individual case involving an incarcerated support obligor.* Adoption of the "no justification" rule, however, would preserve the ability of the BCSE to collect support from incarcerated obligors in similar circumstances without the case-by-case evaluation the "one-factor" approach would require.

Under any approach other than the "no justification" rule, convict parents who know they can suspend a support obligation during a period of incarceration will file petitions to modify and be relieved of liability for those amounts; on the other hand, incarcerated parents who do not know that relief is available will continue to accrue an obligation that a court has no authority to forgive upon their release from prison. In addition to subserviating the interests of the children of an incarcerated support obligor to those of other creditors, such an approach would invite inconsistency and, therefore, unfairness to similarly situated incarcerated parents.[8] In order for fairness and consistency to prevail for all incarcerated parents, there must either be no relief from a child support obligation due to incarceration or some automatic method of suspending a child support obligation immediately upon incarceration of every support obligor. Short of the BCSE finding some miracle method of notifying all incarcerated child support obligors of the right to seek a reduction or elimination of that obligation while in jail, it is most fair to continue the support obligation of all incarcerated parents.[9]

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[8]At least one other jurisdiction has recognized the real-world challenges presented by anything other than a uniform, state-wide approach. *See, In re Marriage of Thurmond*, 962 P.2d 1064, 1073 (Kan. 1998)("Further, the one-factor and complete-justification rules mandate decisions on a case-by-case basis. Hearings would be required on all such motions putting further strains on the custodial parents' finances and time, and consuming large quantities of scarce judicial time. Final resolution of a particular case could be years away from the filing of the motions as the case moves through the court system at the trial and appellate levels.").

[9]Perhaps it is appropriate that this case reaches the court close on the heels of the 2007 legislative session at which efforts were made to address the problems created by the already- overwhelmed family court system. Adoption by this court of the "one-factor" rule would almost certainly invite and encourage a flood of petitions to modify, each one of which would likely require a full evidentiary hearing and, therefore, largely negate the effects of the addition of new family court judges. Adoption of the "complete justification" rule could also cause a sharp spike in the filings of petitions to modify since it is questionable whether this court could fashion a holding that would automatically relieve all incarcerated support obligors of their obligations. In other words, Appellee believes that even if this court were to adopt the

3. *The Incarceration-as-Voluntary Unemployment Consideration*

The final prong of the *Yerkes'* three-consideration approach is the question of whether incarceration should be treated like voluntary unemployment. Appellant in the present case voluntarily engaged in a course of conduct (sexual assault of a child) that foreseeably could have led to his incarceration. While incarceration is not a circumstance explicitly recognized under *West Virginia Code* §48-1-205 as a basis to attribute income (as is, for example, voluntary unemployment), the same arguments apply. Under these circumstances, it is entirely appropriate to treat Appellant's incarceration in the same manner as voluntary unemployment for purposes of attributing income under *West Virginia Code* §48-1-205.

One of the Legislature's stated goals is to provide safeguards for the uniform treatment of similarly situated support obligors by child support decision-makers. *West Virginia Code* §48-13-101. There is no discernable reason why Appellant in this case should be treated differently from the support obligor to whom income was attributed in *Porter v. Bego, supra.* In *Porter*, the court found the support obligor suffered a loss of income from forces entirely within his own control: he voluntarily quit his job without cause. The court concluded that the law allowed "...a family law master or circuit court to attribute income to a parent when there is evidence that the parent has, without a justifiable reason, voluntarily acted to reduce their income." 488 S.E.2d at 450-51.

"complete justification" rule, each incarcerated support obligor would still have an affirmative duty to file a petition to modify before that support obligation could be modified. *West Virginia Code* §48-14-106(a); *Carter v. Carter*, 479 S.E.2d 681 (W.Va. 1996).

Appellant's loss of income in this case also resulted from forces entirely within his own control. Knowing the foreseeable consequences of his criminal conduct Appellant "...without a justifiable reason, voluntarily acted to reduce (his) income" when he committed the crime of third degree sexual assault. *Id.* This court should conclude, as did the court in *Yerkes*, "...that an incarcerated obligor, though in somewhat different circumstances from a voluntarily unemployed obligor, has control over his or her circumstances similar to that of a voluntarily unemployed obligor. Accordingly, it is appropriate to treat these two types of obligors alike." *Yerkes*, 824 A.2d at 1177.

Among the various jurisdictions that have addressed this issue, there is a great deal of semantic arguing over whether incarceration is voluntary or involuntary for purposes of comparing an incarcerated parent to an unemployed parent with respect to attributed income. The Kentucky Court of Appeals resolved this conflict by resorting to traditional rules of statutory construction in *Commonwealth ex rel. Marshall v. Marshall*, 15 S.W.3d 396 (Ky.Ct App. 2000). Citing new Kentucky statutory language remarkably similar to the West Virginia attributed income provision, the court noted:

> This statutory change, coupled with the statute's exception for imputing income to two specific groups (that is, incapacitated parents and those caring for children three years of age and under) convince us that the Legislature did not intend to exempt incarcerated parents from those for whom income should be imputed for purpose of child support. Certainly, the Legislature is aware that incarcerated parents are no more able to obtain employment than parents of young children or mentally or physically disabled parents. Thus, the Legislature's refusal to include incarcerated parents among those identified as being excepted from imputed income convinces us that

> incarcerated parents are to be treated no differently than other voluntary unemployed, or underemployed parents owing support.

15 S.W.3d at 401-02. Much like the cited Kentucky statute, *West Virginia Code* §48-1-205(c) exempts certain, distinct categories of parents from the attribution of income: (1) those providing care to preschool or handicapped children; (2) those who are pursuing a plan of economic self-improvement, and; (3) those who, for valid medical reasons, no longer earn as much as they once did. The statute also permits a court not to attribute income to an unemployed or underemployed parent upon "...a written finding that other circumstances exist which would make the attribution of income inequitable." *Id.*

While a court could seize on the language of the final, non-specific exception of *West Virginia Code* §48-1-205(c) in declining to attribute income to an incarcerated parent, a much more natural reading of the statute demands otherwise. Much like incarceration, the specific conditions identified in the first three exceptions of *West Virginia Code* §48-1-205(c) apply to large, distinct categories of parents whom, for public policy reasons, the Legislature saw fit to exempt from the attribution of income: caretakers of young or disabled children, parents in some kind of training or educational program and parents who are disabled or partially disabled. If the Legislature had intended to exempt any other large, distinct category of parents–such as prisoners–it would have been natural specifically to include reference to that category rather than to assume the category would have been exempted by the non-specific last exception. "Thus, the Legislature's refusal to include incarcerated parents among those identified as being excepted from

imputed income" is highly persuasive evidence of the Legislature's intent "that incarcerated parents are to be treated no differently than other voluntary unemployed, or underemployed parents owing support." 15 S.W.3d at 402. In West Virginia, this court has recognized that: "(i)t is for the Legislature, and not this court, to establish the parameters for attributed income." *State ex rel. DHHR v. Baker*, ftnt. 6, 557 S.E.2d 267, 272 (W.Va. 2001). The Legislature's failure to include incarcerated parents as a discrete category of those exempted from attributed income is strongly supportive of the notion that West Virginia should treat incarceration the same as voluntary unemployment for purposes of child support.

There is a close analogy and strong support in existing West Virginia law to the distinction drawn between unemployment created by wholly willful and voluntary acts as opposed to unemployment created by acts or circumstances outside of the control of an individual. West Virginia unemployment compensation law indefinitely disqualifies from the receipt of benefits any employee who leaves work "voluntarily without good cause involving fault on the part of the employer" as well as those who are terminated for "gross misconduct." *West Virginia Code* §21A-6-3(1) and (2). On the other hand, unemployment arising from a layoff–a circumstance entirely outside of the control of the employee–does not occasion a denial of benefits. An employee who engages in statutory "gross misconduct" (such as showing up at work under the influence of alcohol) no more intends for that conduct to result in the termination of his employment (and a subsequent denial of unemployment benefits) than does a support obligor who

engages in criminal conduct likely to result in his incarceration. Both the drunk employee and the criminal child support obligor, however, nonetheless share a subjective realization of the fact that engaging in conduct of a voluntary nature can have ramifications beyond the mere loss of employment. In essence, then, it is the nature of the conduct itself–as opposed to the specific intent of the person engaging in that conduct–which, under West Virginia unemployment compensation law, distinguishes between the legal effect of intentional conduct that has unintended but foreseeable consequences as opposed to conduct that is entirely outside of the control of the individual.

Engaging in a course of criminal activity likely to result in incarceration almost always involves conduct that is more voluntary and deliberate than it is accidental or negligent, although it is rare that the criminal's specific intent is to become incarcerated for purposes of avoiding a child support obligation.[10] Almost absurdly, Appellant in this case argues that he did not commit his crime with the intent of reducing his child support.

Although he technically voluntarily committed the crime, he

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[10]Appellee readily acknowledges that some criminal acts require no specific intent (e.g., negligent homicide). It would seem an incredibly weak argument for an outright rejection of the "no justification" rule that there may be a tiny fraction of incarcerated support obligors whose imprisonment results from entirely non-voluntary conduct. Rather, the "no justification" rule–applied *in pari materia* with the escape clause of *West Virginia Code* §48-1-205(c)(4)–would permit family courts to consider the underlying nature (e.g., voluntary vs. negligent) of the criminal conduct. Although this application would require independent decisions by family courts on individual petitions to modify, the actual volume of such cases would likely be low and the particular factual inquiry would be very limited and, therefore, unlikely to lead to inconsistent results among family court circuits.

> didn't (sic) do so with the intent of reducing his child support. Intent to commit a crime is not the same as intent to reduce child support. One does not commit a crime with the intent of serving time in jail.

Brief of Appellant, p. 4. Appellee does not challenge Appellant on this assertion. The logical extension of Appellant's argument, however, is to limit the attribution of income to incarcerated child support obligors *only* when it can be proven the obligor committed a crime with the specific intent of going to jail for the specific purpose of reducing a child support obligation. In other words, Appellant urges this court to adopt the "complete justification" rule which would relieve all incarcerated parents from all child support obligations during all periods of incarceration. Such an outcome flies directly in the face of the legislative priority assigned to child support obligations, the public policy favoring support of children by their parents and the majority trend of other jurisdictions that have addressed this issue.

D. The arguments against the continuation of a child support obligation on an incarcerated parent are insubstantial and inconsistent with the public policy of West Virginia.

A minority of jurisdictions have recognized and adopted (with, at times, gymnastically contorted logic) the position advanced by Appellant. In general, it seems the courts that have waived a child support obligation try to find and to rely on public policy considerations they deem more important than the interests of the children of incarcerated parents. Perhaps the most superficially compelling of these contrary arguments is a legal Catch-22 that could be created by imposing support obligations

that incarcerated parents can not pay: since federal funds to state child support collection agencies are based in part on a state's collection efficiency, imposing a presently uncollectable obligation on an incarcerated convict can have the effect of lowering an agency's collection ratio and, therefore, the federal funds available to it and, ultimately, its ability to collect support. *Bergen County v. Steinhauer*, 683 A.2d 856 (N.J. Super. 1996). The *Steinhauer* court recognized, however, that states can be insulated from a loss of federal funds on a variety of grounds. 683 A.2d at 858. In addition, the New Jersey court acknowledged that since the suspension of an existing support obligation requires an affirmative request for modification, the failure to make that request by many incarcerated parents means collection ratios are already skewed by the continuing obligations of incarcerated parents. *Id.*

The *Steinhauer* court's concern for the loss of federal funds was later called "conjectural" by the Appellate Division of the New Jersey Superior Court, which went on to state: "The argument that New Jersey may lose federal funding if courts do not suspend the support obligations of incarcerated obligors gives priority to federal funding at the expense of the children of incarcerated parents. ...we conclude that the public policy interest of protecting the children of incarcerated parents greatly outweighs the speculative need to protect federal funding in non-public assistance cases." *Halliwell v. Halliwell*, 741 A.2d 638, 647 (N.J. Super. Ct. App. Div. 1999).

Other public policy arguments courts have offered against the imposition of a child support obligation during a period of incarceration include the contention that an

uncollectable support obligation provides no present benefit to the child, *Leasure v. Leasure*, 549 A.2d 225 (Pa. Super.Ct. 1988)[11]; the conviction that courts should not enter unenforceable orders, *Steinhauer*, 683 A.2d at 861; and the proposition that such an obligation amounts to a double penalty against the already incarcerated parent, *Pierce v. Pierce*, 412 N.W.2d 291, 293 (Mich. App. 1987).

As applied to the facts of the present case and the substantial public policy considerations in West Virginia, each of these arguments fails. There can be no dispute that an order continuing child support against an incarcerated parent stands little chance of providing an *immediate* benefit to the child unless there are substantial assets from which that parent can pay support. The compelling public policy of this state, however, demands the continuation of a support obligation against an incarcerated parent in order to secure at least some likelihood of a future recovery by the children, by the custodial parent or by the state. The related argument–that courts should not enter unenforceable orders–is similarly flawed because a child support order entered against an incarcerated parent is not unenforceable. To the contrary, such an order merely acknowledges that the needs of the convict's children do not evaporate during the parent's incarceration and that someone else is supporting those needs during the parent's time in prison. The order becomes fully enforceable–and

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[11]While Appellant's brief cites to the *Leasure* case (the correct citation for which is 549 A.2d **225**) as support for the proposition that "(g)oing to prison is not a voluntary act", the brief makes no reference to the fact that the 1988 *Leasure* decision was specifically disapproved of by the Supreme Court of Pennsylvania in *Yerkes, infra*. Brief of Appellant, pp. 4-5; 824 A.2d at 1177, ftnt. 12.

likely to result in an ultimate recovery–once the parent is released from custody and is subject to the tools available to BCSE for the collection of support.[12] The final public policy argument against the continuation of the support obligation during incarceration disingenuously refers to that obligation as an "additional penalty" against the parent who is already being punished for the criminal activity. *See, Ohler v. Ohler,* 369 N.W.2d 615, 618 (Neb. 1985)(Krivosha, C.J., dissenting). Perhaps it is the age of the case and the different attitudes towards child support that now prevail but the argument that child support amounts to a penalty in addition to a criminal sanction has been all but abandoned by courts that have recently addressed this question.

E. West Virginia law on parents' obligations to support children is becoming more strict and uniform and the adoption of any approach other than the "no justification" rule would undermine this trend.

This court has been a vocal and frequent champion the rights of children to receive support from their parents and the immutable obligation of parents to provide that support. *See, e.g., In re Jamie Nichol H.*, 517 S.E.2d 41, 48 (W.Va. 1999)("Provision of

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[12]Appellee believes the *only* valid public policy argument against the imposition of a support obligation during periods of incarceration derives from the potential that a high, post-incarceration arrearage may drive certain support obligors into the underground economy, thereby reducing or eliminating the prospect of collecting unpaid support. This prospect is, in fact, already a reality in many areas of the state since it is the mere imposition of any support obligation–as opposed to the accumulation of arrearages while incarcerated–that encourages some support obligors to seek employment in informal circumstances in order to avoid child support. In addition, with no uniform rule in the state, no automatic suspension of child support upon incarceration, and no means of modifying an accrued arrearage, Appellee argues that any *increase* in the numbers of support obligors moving into the underground economy as a result of the adoption of the "no justification" rule is likely to be limited.

shelter and financial support for children is one of the most basic components of parental responsibility."); *Wyatt v. Wyatt*, *Syl. Pt. 3*, 408 S.E.2d 51 (W.Va. 1991)("The duty of a parent to support a child is a basic duty owed by the parent to the child..."); *Rebecca Lynn C. v. Michael Joseph B.*, 584 S.E.2d 600, 603 (W.Va. 2003), *quoting Armour v. Allen*, 377 So.2d 798, 799-800 (Fla.Dist.Ct.App. 1979)("Child support is a right which belongs to the child. It is not a requirement imposed by one parent on the other; rather it is a dual obligation imposed on the parents by the State."); *see also generally, Rebecca Lynn C. v. Michael Joseph B.*, Davis, J., dissent, 584 S.E.2d. at 605. This court has also recognized the significance of the satisfaction or non-satisfaction of a child support obligation in other contexts. *See, e.g., In re Carter*, 640 S.E.2d 96 (W.Va. 2006)(denying a name change for a minor child based largely on the payment of child support by the objecting biological father); *State ex rel. Shepard v. Holland*, 633 S.E.2d 255 (W.Va. 2006)(denying a writ of prohibition based on vagueness and insufficiency of the indictment to the defendant in a criminal child support prosecution).

The legislative trend in child support also suggests a migration towards an atmosphere of less–as opposed to more–discretion in the establishment and enforcement of support orders. For example, many sections of the child support statutes require reliance on the child support guidelines and further require any deviations from those guidelines to be justified and supported by specific findings of fact on the record. *See, e.g., West Virginia Code* §48-11-103(a) (requiring specific factual findings supporting

an award of child support beyond age 18); *West Virginia Code* §48-11-105(c) (requiring that a modified support award conform to the guidelines); *West Virginia Code* §48-12-103 (mandating that medical insurance costs be considered in the application of the guidelines); *West Virginia Code* §48-13-203 ("The amount of support resulting from the application of the guidelines is presumed to be the correct amount, unless the court, in a written finding or a specific finding on the record, disregards the guidelines or adjusts the award as provided for in section [§48-13-702.]); *West Virginia Code* §48-13-701 ("The guidelines must be used by the court as the basis for reviewing adequacy of child support levels in uncontested cases as well as contested hearings."); *West Virginia Code* §48-13-702(a) (requiring specific findings on the record in order to deviate from the amount set by the guidelines); *West Virginia Code* §48-14-401 (mandating that every child support order include automatic income withholding).

The lesson of these trends is that the public policy of West Virginia–no less so than any other state–demands a uniform approach to ensuring that parents provide adequate support for their children. At present, the absence of a uniform rule on how incarcerated support obligors are to be treated has created a patchwork of different approaches cobbled together by the family courts of this state. The best interests of the children of West Virginia do not, however, vary from family court circuit to family court circuit. Those interests have been and will always be best served by the parents of West Virginia's children taking the primary role in providing for the financial needs of their children. When a parent renders himself or herself temporarily unable to fulfill those needs because of incarceration arising from a voluntary act, the public policy of

this state–as repeatedly articulated by this court and as expressed in various statements of legislative intent–would seem to require two things: first, that all similarly situated parents be treated comparably to each other, and; second, that parents not shift to the other parent, to third parties or to the state the financial element of parenthood that is "...one of most basic components of parental responsibility." *In re Jamie Nichol H.* 517 S.E.2d at 48.

III. Conclusion

The majority of other jurisdictions (those adopting the "no justification" rule) have concluded for a variety of public policy reasons that the imposition or continuation of a child support obligation on an incarcerated parent strikes a reasonable and effective balance between the interests of the children and the capacity of the parent to provide for them. A minority of jurisdictions ("complete justification") have concluded that the interests of the incarcerated parents wholly trump those of the children to whom they owe a legal and moral duty of support. Finally, a handful of jurisdictions ("one-factor") favor unfettered discretion, time-consuming case-by-case determinations and the non-uniform approach of considering incarceration as only one among a variety of other factors playing into a decision to continue child support while a parent serves jail time. While the "no justification" approach is not without flaws, it is the approach that is most consistent with the historical emphasis this court has placed on the enforcement and collection of child support obligations. It is also the approach that is most likely to result in consistency and predictability in the treatment of child support obligors across the state who find themselves in similar circumstances.

Appellee urges this court to deny the appeal and to affirm the holding of the Family Court of Cabell County.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ANGELA ADKINS,
Appellee (Petitioner below)

v.

Docket No. 33312

CHRISTOPHER ADKINS
Appellant (Respondent below)

Certificate of Service

I certify that on the 29th day of March, 2007, I served a copy of the attached BRIEF OF APPELLEE on Appellant by depositing a true and accurate copy in the United States Mail, first-class postage pre-paid, and addressed to:

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